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In The

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

-vs-

GABRIEL BRIGUGLIO,

Petitioner.

SUPPLEMENTAL APPENDIX FOR PETITIONER

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NOT FOR PUBLICATION

ORIGINAL FILED AUGUST 5, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 79-72

UNITED STATES OF AMERICA,

Plaintiff,

v. OPINION

GABRIEL BRIGUGLIO,

Defendant.

APPEARANCES:

W. Hunt Dumont, Esq.
United States Attorney
BY: Robert A. Weir, Jr.,
Asst. U.S. Attorney and
Kenneth Ballen, Esq.
Asst. U.S. Attorney

Alan Dexter Bowman, Esq.
Attorney for Defendant
Gabriel Briguglio

MEANOR, District Judge

This opinion is the consequence of an evidentiary hearing ordered by the Court of Appeals for the Third Circuit in **Briguglio v. United States, 675 F.2d 81 (3d Cir. 1982).**

Petitioner, Gabriel Briguglio, was convicted in this court in May 1979, along with Anthony Provenzano and Thomas and Stephen

Andretta, of violations of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1962 (1970). Briguglio was convicted of conspiracy to violate RICO and of one substantive count under that statute. He was given two concurrent seven year terms, which he is now serving. The full facts of that case are set forth in the opinion of the Court of Appeals affirming the convictions of Provenzano and the Andretta brothers. **United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. den. 449 U.S. 899 (1980).**

Briguglio was severed from the appeal in that case because the government moved before the Court of Appeals to disqualify his then appellate counsel. The motion to disqualify was remanded to this court, and, in a motion be granted. Counsel was disqualified and, subsequently, Briguglio's convictions were affirmed by Judgment Order dated November 17, 1980. **United States v. Briguglio, 636 F.2d 1211 (3d cir. 1980), cert. den. 451 U.S. 937 (1981).**

The claim presently before the court is that, since Briguglio's trial counsel, Thomas DiBiasi, was a target of a grand jury investigation in this district at the time of the Provenzano trial, he was an impermissible conflict of interest that requires vacation of Briguglio's convictions. The records of this court show that DiBiasi was indicted on August 14, 1979 along with two others in **United States v. Juliano, et al.**, Crim. No. 79-283. DiBiasi was severed for trial from his codefendants who were found guilty and whose convictions have now been affirmed. **United States v. Juliano, 661 F.2d 915 (3d Cir. 1981), cert. den. __ U.S. __ 71 L.Ed.2d 848 (1982).** Thereafter, on November 17, 1980, DiBiasi pleaded guilty to a superseding information charging him with a misdemeanor violation of **18 U.S.C. §657 (1976).** The gist of the charge was that DiBiasi aided and abetted the submission of false credit information to a savings and loan association for the purpose of influencing the

grant of a loan. On December 23, 1980, DiBiasi was sentenced to probation for three years and fined $1,000.

In its opinion requiring an evidentiary hearing, the Court of Appeals quoted the following passages from **Cuyler v. Sullivan**, 446 U.S. 335, 348 and 349-350 (1980):

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance...[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. 675 F.2d at 82-83.

These are the standards by which I must be guided. It is, therefore, Briguglio's burden to show that DiBiasi was acting under an actual conflict of interest and that that conflict adversely affected his performance. If these requisites are met, prejudice need not be shown.

To establish an actual conflict of interest heavy reliance is placed on **United States v. DeFalco, 644 D.2d 132 (3d Cir. 1979)**. There an attorney was under indictment and engaged in plea bargaining while representing his client on appeal. In fact, only a few days before the appeal was submitted without oral argument, the attorney pleaded guilty to one of three indictments pending against him on a plea bargain that contemplated dismissal of the others. As a consequence of the guilty plea the attorney was suspended in this court at the time his client's appeal was submitted. The court of Appeals held that on these facts there was a conflict of interest as a matter of law and, absent waiver, the client was entitled to a fresh appeal with new counsel.

The facts in this case are vastly different from those in **DiFalco**. Here DiBiasi knew before the start of the **Provenzano** trial only that he was under grand jury investigation. He had responded to a grand

jury subpoena directed to his clients by delivering documents to the office of the United States Attorney. There was no indictment until long after the trial was over. It began on May 7, 1979 and concluded with the jury's verdicts on May 25, 1979. Sentencing took place on July 10, 1979--over a month before Dibiasi was indicted on August 14, 1979. Dibiasi had been informed during the trial that no action would be taken against him until the **Provenzano** matter had been concluded. Hence, there was no indictment at any relevant time and there clearly was no plea bargaining by DiBiasi.

DiBiasi has testified that he did not believe he would be indicted and did not fear that event until sometime in June 1979. Hence, he states, his potential criminal troubles did not adversely affect his representation of Briguglio. This assertion is somewhat contradicted by an affidavit executed by him on September 20, 1979 in which he states:

> I feel, however, due to the nature of the investigation which eventually led to my own

> indictment, that subconsciously, I was not in a position to give my client a total and proper defense and as a result of this, he may have been denied his right to competent counsel.

He excuses his affidavit statement by noting that it was drawn by successor counsel for Briguglio.

The conflict asserted because of DiBiasi's dual status as a grand jury target and a defense attorney opposing the same office that was investigating him holds forth two possible avenues of improper representation. First, the defense attorney could bargain away his client's rights in order to gain an advantage for himself. He could, for example, persuade his client to agree to a disadvantageous plea on an understanding with the prosecution that the client's plea would be a grade for leniency for him. If such a plea could not be entered, the defense attorney could "throw" the case on the understanding that by so doing he would be rewarded by having the prosecution "go easy" on him.

Second, the fact that the defense attorney is under grand jury investigation might make him so personally distraught that he would not be able to devote sufficient skill and attention to his client's cause. It should be noted that this latter potentiality would exist even if the investigating office were different from that being opposed by counsel under investigation.

The first of these possibilities is not asserted here. Such an event would necessitate a corrupt prosecutor as well as a corrupt defense attorney. I believe DiBiasi's statement that he did not expect to be indicted until sometime in June 1979 when he realized that he, as well as his former clients, was a serious subject of the grand jury's inquiry. there simply is no evidence that DiBiasi sought to "trade off" Briguglio for favorable consideration for himself. Furthermore, there was no opportunity for him to do so. At all times relevant to this matter, there was no charge pending against

DiBiasi and there was no plea bargaining with him. The government wisely and scrupulously avoided any discussion with Dibiasi pending completion of the Provenzano trial, except to inform him of the fact that no action would be taken on the matter in which he was under investigation until that case had been concluded.[1]

It is the second possibility--what the Third Circuit has called "inherent emotional and psychological barriers"--[2] that is being

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[1] There was another contact between Dibiasi and the government regarding the Juliano grand jury investigation that took place after Dibiasi had entered his appearance for Gabriel Briguglio on February 27, 1979. A grand jury subpoena, dated March 9, 1979, was directed to him requiring the production of records pertaining to various clients of DiBiasi's firm. DiBiasi produced the records but did not testify. This subpoena may have hinted to Dibiasi that he was a potential target. He claims that he did not realize he was a target until being so informed in June 1979. The Assistant United States Attorney in charge of the Juliano investigation states that dibiasi was informed of his status as a possible target in April 1979. I accept the latter statement as true. What is also true is that dibiasi did not consider himself to be in serious jeopardy of indictment until June 1979.

[2] United States v. DeFalco, 644 F.2d at 136.

pressed here. In support of this thesis various attacks are made upon the quality of DiBiasi's actions as defense counsel.

United States v. DeFalco is the only case cited to me in support of the proposition that Dibiasi, as a grand jury target and defense counsel in unrelated matters, was under conflict of interest. Yet as the court made clear, 644 F.2d at 137 n.5, it was the entire factual complex of that case upon which it rested its conclusion of a conflict as a matter of law. That complex encompassed three indictments, plus plea bargaining, plus a guilty plea. The **DeFalco** facts are a far cry from those here. In this case there was only a grand jury investigation. Many persons are investigated by grand juries and not indicted. There was no indictment of DiBiasi at any relevant time and there was, of course, no plea bargaining.

Under the circumstances here, I find that DiBiasi was not, at any time during his representation of Briguglio, acting under an

actual conflict of interest. He was not opposing, on his own behalf, the same prosecutorial office that was representing the United States in the case against his client. At no relevant time was there a case against him in which he could oppose the government. At best, there was only the possibility of a future conflict. That conflict never arose, because by the time DiBiasi was indicted he had ceased his representation of Briguglio.

The above finding of no actual conflict on the part of DiBiasi would require that the attacks on the adequacy of his representation be judged by the standard of "customary skill and knowledge" set forth in **Moore v. United States**, 432 F.2d 730, 736 (3d Cir. 1970). for the reasons which follow, I find that DiBiasi amply met the **Moore** standards. Moreover, assuming, arguendo, that an actual conflict existed, it had no adverse affect on DiBiasi's performance. The subsequent discussion of the claimed inadequacies of DiBiasi's representation will be couched in terms based

on this arguendo assumption, on the understanding that that discussion also encompasses a finding of compliance with the **Moore** standard.

As noted above, various attacks are made upon the adequacy of DiBiasi's representation. I agree with Chief Judge Seitz in his dissenting opinion in **Defalco** that in a case such as this both inadequate representation and prejudice should be shown, since the reasons for presuming prejudice in joint representation cases do not exist here. However, as I read the opinion remanding this case for an evidentiary hearing, the Court of Appeals had translated the rules governing cases of joint representation to this case. Thus, if there was inadequate representation, prejudice need not be established as a prerequisite to relief.[3]

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[3] In joint representation cases involving privately retained attrneys the New Jersey Supreme court conclusivel presumes prejudice, absent waiver. **State v. Bellucci, 81 N.J. 531 (1980); State v. Land, 73 N.J. 24 (1977).** The rule has been modified in the case of representation by public defenders from the same office. In that event there must be both

It is claimed that DiBiasi's status as a grand jury target impaired his client's ability to plea bargain. Trial counsel for the government in the Provenzano case was Jeffrey Speiser. The jury began its deliberations on May 23, 1979. While the jury was deliberating DiBiasi had a discussion with Speiser concerning a possible guilty plea from Briguglio. A meeting was held in my chambers on this subject. Present with me were Speiser, Jo Anne Alderstein, associate counsel for the government, Robert Stewart, head of the Newark Strike force, and DiBiasi. It was clear that Briguglio would not admit his guilt and that DiBiasi wanted to discuss an Alford plea.[4]

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a potential conflict of interest and a significant likelihood of prejudice. State v. Bell, __ N.J. __, No. A-35/117 (July 1, 1982).

[4] North Carolina v. Alford, 400 U.S. 25 (1970) in which the Supreme Court held that it was constitutionally permissible to accept a guilty plea from a defendant who maintains his innocene as long as the defendant intelligently concluded that the entry of the plea was in his best interests and it ws demonstrated on the record that the prosecution had strong evidence of guilt.

DiBiasi also wanted to discuss a sentence bargain. The discussion was brief. The plea conditions were not acceptable to the government.

After DiBiasi left the room, Speiser informed me that DiBiasi was under grand jury investigation in this district. That was the first time I knew of it. Later, in an affidavit executed May 29, 1981, Speiser stated:

> After the meeting ended, Mr. DiBiasi left the room. I remained in Judge Meanor's chambers but I do not recall who else was in the room. I informed Judge Meanor that Mr. DiBiasi was under investigation by the United States Attorney's office and there was a possibility that the investigation would lead to an indictment. I informed Judge Meanor of this fact in order to explain why the United States Attorney's Office would not accept a plea of guilty without an acknowledgement of guilt. I explained to Judge Meanor that if such a plea was accepted and Mr. DiBiasi was later indicted there might be a question as to the validity of the plea. I did not tell Judge Meanor the nature of the substance of the investigation of Mr. DiBiasi.

The claim that DiBiasi's ability to plea bargain in behalf of his client was impaired by his status as a subject of a grand jury

investigation is supported by an admission made by government counsel during oral argument of the appeal when, under prodding by the court, counsel stated that in the matter of plea bargaining Briguglio was treated differently. As I understand the present argument, DiBiasi is said to have been thus rendered inadequate in the matter of plea negotiation. This inadequacy, it is said, in turn leads to vacation of Briguglio's convictions irrespective of the fact that Briguglio was not prejudiced--i.e., he advanced plea conditions that would not have been acceptable in any event.

Before dealing with this issue, I must express my disturbance with the manner in which the question of plea bargaining entered this case. The subject was raised for the first time in Briguglio's initial brief in the Court of Appeals. It was not raised before me in any prior proceeding. On July 1, 1981, I

filed a 15 page opinion dealing with all the issues raised and impairment of the ability to plea bargain was not among them.

In its appellate brief the government, for some reason unknown to me, did not inform the Court of Appeals that the plea bargaining issue was then being raised for the first time. Instead, it chose to meet the issue with a reference to facts outside the record. This issue became the focal point of the oral argument on appeal and seems to have been the issue that most greatly concerned the Court of Appeals.[5] The opinion of that Court in this case fails to note that the plea bargaining issue was not raised in the district court. I find this odd, because any discussion of this question was noticeably absent from my opinion denying the petition without an evidentiary hearing. Surely, someone connected with the appeal should have realized that I would not

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5 I have both read a transcript of the oral argument of March 3, 1982 and listened to a tape of that argument. Listening to the tape is more helpful as I am able to recognize the voices of the judges who composed the panel.

have ignored the issue had it been projected. Nonetheless, despite my distaste for the manner in which the question arose, I am under a mandate to deal with it.

Despite Speiser's affidavit and the unfortunate admission during oral argument before the Court of Appeals, it is apparent that DiBiasi's ability to plea bargain for Briguglio was in no way affected by the ongoing grand jury investigation. The present record is absolutely clear that Speiser and DiBiasi, before the jury retired, had had plea discussions, each of which DiBiasi rejected. Speiser had no authority to accept a plea. He could recommend its acceptance to Robert Stewart, head of the Newark Strike Force. Stewart, in turn, would have had to clear a plea with Department officials in Washington.

The testimony of Speiser and Stewart makes it plain that no Alford plea from Briguglio would have been accepted. The government insisted on an admission of guilt. Briguglio would not admit guilt and so

testified during the present proceeding. Other details of a plea bargain, such as a limit on sentence or a plea to an information, were never discussed, except perhaps in passing, because the initial requisite--an admission of criminal responsibility--could not be met.[6] In fact, Stewart and Speiser testified that late in the trial a plea inquiry was made on behalf of Provenzano, but before the brief plea discussion about Briguglio took place in my chambers. Provenzano wanted a sentence bargain for three years. His attorneys were told by Speiser that any sentence bargain would have to be "somewhat in the nature of five years or more." Speiser also told Provenzano's counsel that Provenzano would have to admit his guilt. Counsel stated that they would consult

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6 As of this writing I have been a judge of this court for one month shy of eight yers. During that time I have probably taken several hundred guilty pleas. I have never heard of such a plea in this district. In addition, only once, under circumstances impossible to repeat, have I seen the government sentence bargain. I understand that on some rare occasions sentence bargaining has taken place before other judges.

Provenzano and get back to Speiser. Stewart checked with Washington and was told that the plea offer by Provenzano was unacceptable.

It is readily apparent that without an admission of criminal responsibility, which Briguglio refused to make, a plea from him was an impossibility. The requirement of an admission of criminal responsibility as a condition of a plea bargain had nothing to do with Dibiasi's status as a grand jury target. This record shows without doubt that an **Alford** plea from Briguglio was impossible under any cricumstances Dibiasi could not be rendered inadequate to accomplish the impossible.[7]

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[7] A defendant who cannot strike a plea bargain with the government is not precluded from avoiding trial. He could offer a plea of **nolo contendere** to the indictment; he could plead guilty to the indictment; or he could offer an **Alford** plea to the indictment. I have had defendants, who would notmeet the government's condition of cooperation as an ingredient of a plea bargain, plead guilty to the entire indictment. Nolo pleas are opposed as a matterof course by the government. Absent a plea bargain, there must be a plea to the entire indictment, for the court has no power to plea bargain, and only with the government's consent can a count not the subject of a plea be dismissed. Briguglio

There are several other claimed inadequacies on DiBiasi's part. one is the failure to have Briguglio testify in his own behalf. Briguglio testified to the effect that he wanted to testify, but was persuaded not to do so by DiBiasi. DiBiasi has testified that, after pointing out the pitfalls that might be encountered on cross-examination, he left that decision to his client. dibiasi also states that it was the consensus among defense counsel that they had an excellent chance for a favorable verdict, and did not want to take any significant risk of improving the government's case by defense testimony. I believe this latter assertion to be correct. The entire case hinged on the credibility of a nefarious character named Ralph Picardo and there was very little corroboration of his version of events. Picardo was very ably and very effectively cross-examined and it was by

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never offered any of these alternatives. Nor would it have been in his interest to do so. A plea to the two counts of the indictment in which he was charged would hve brought about exposure of 20 years on each count.

no means unreasonable to expect that the jury probably would not accept him as a credible witness.

I do not believe that DiBiasi directed or ordered Briguglio not to testify. I accept his testimony that he left the decision to the defendant after thoroughly explaining the risks. Provenzano and Thomas Andretta had criminal records nd did not testify. Stephen Andretta and Briguglio had no prior record. However, it is not uncommon for a defendant with no record not to testify. I have seen it happen many times. I accept Dibiasi's version that he left the ultimate decision whether to testify to Briguglio because that is the usual course of events and would be the expected conduct of a lawyer participating in the decision whether a defendant should testify. Therefore, I find that the decision not to testify was Briguglio's own. I also find that it was an intelligent one under the circumstances, a description of which follows.

Two checks were put in evidence that bore Briguglio's fingerprints. Picardo testified that they were payoff checks. As to the earlier check, Briguglio had no explanation as to how his fingerprints came to be there. He did have an explanation as to the second check. He claims that he met Mrs. Thomas Andretta at a gas station and that she informed him that she had a check to deliver to her brother-in-law, Stephen Andretta at the Chateau Renaissance, a restaurant which Provenzano frequented. Since Briguglio was going to pass that restaurant in a few minutes, he offered to deliver the check for her and his offer was accepted. Mrs. Thomas Andretta was in court throughout the trial. there is no evidence that she would have corroborated Briguglio's testimony. Since her availability easily could have been made known to the jury, her failure to verify this story could have been most damaging.

There also probably is an additional reason why Briguglio did not testify which was not mentioned at the hearing on this matter. It is obvious to me, since I was the trial judge in the Provenzano prosecution, that the defendants had determined to put on a united front. The case was tried by all defendants on the credibility of Picardo and the paucity of evidence corroborating him. No defendant attempted anything to help himself at the expense of implicating others.

Had Briguglio testified as outlined above, that testimony would have implicated Stephen Andretta directly and his brother indirectly, for it must be remembered that Picardo testified that the check Briguglio claims he delivered to Stephen Andretta as a favor was in fact a pay-off check procured in extortion of Seatrain.

Since I find that Dibiasi left the decision whether to testify to Briguglio after an adequate explanation of the dangers inherent in cross-examination, there can be no legitimate claim of inadequacy on his part.

It is asserted that DiBiasi refused to put on character witnesses that Briguglio desired. DiBiasi testified that Briguglio had been mentioned in newspaper stories as having been involved in the 1975 disappearance of Jimmy Hoffa and that he was afraid that this

would be brought out on cross-examination of character witnesses. This was not an unfounded fear. See Michelson v. United States, 335 U.S. 469 (1948) and United States v. Apfelbaum, 621 F.2d 62, 65 (3d Cir. 1980) in which a ruling was upheld that extended permission to the government to cross-examine a character witness on the basis of a newspaper story. Under these circumstances, DiBiasi cannot be labeled inadequate for not producing character witnesses. Furthermore, there is no proof before me that Briguglio had character witnesses willing to testify for him.

Petitioner asserts that DiBiasi was not sufficiently alert to avoid jury confusion between him and his deceased brother,

Salvatore Briguglio. Salvatore was deeply involved in the criminal enterprise that underlay the Provenzano case and would have been a defendant had he lived. There is no merit to this agreement. The jury fully understood that it was Gabriel, not Salvatore, who was on trial, and the record will not support the claim that the jury was misled into believing that actions of Salvatore were those of the defendant.

Finally, we come to the last of the claims of inadequacy on the part of DiBiasi. Criticism is leveled at his cross-examination of Ralph Picardo. The gist of the indictment in the Provenzano matter was that the defendants, by reason of their domination over Teamsters Local 560, extorted money from

Seatrain Lines, Inc. in exchange for labor peace. DiBiasi asked Picardo if his client would insure labor peace "in and of himself" to which he got surprise affirmative answer. It was a logical question to ask since, as Picardo knew, and as was brought out at trial, Gabriel Briguglio was not connected with Local 560. I do not believe that DiBiasi can be said to be inadequate because of this one question.

It is also contended that DiBiasi prematurely terminated his cross-examination of Picardo. This, simply, is not true. It must be pointed out that DiBiasi was fourth and last on cross and he had been preceded by three extremely able defense lawyers. Most of the work had already been done by the time DiBiasi began his examination and repetition of previous cross would not have been good tactics and undue repetition would not have been allowed. No fair reading of the record can support the conclusion that there was anything inadequate about DiBiasi's cross-examination of Picardo.

It is my conclusion about the criticisms now leveled at this petitioner's former counsel are totally unjustified. It is my finding that DiBiasi's representation of Gabriel Briguglio was more than adequate and in fact, exceeded the standard of average competency.

For the reasons set forth in this opinion, the present petition will be dismissed. The court will enter its own order.

DATED: August 5, 1982